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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 HARVEY J. KESNER,

4 Plaintiff,

5 v.

20 Civ. 3454 (PAE)

6 BARRON'S, INC., et al.,

7 Defendants.

8 -----x

New York, N.Y.

9 July 19, 2021

3:00 p.m.

10 Before:

11 HON. PAUL A. ENGELMAYER,

12 District Judge

13 APPEARANCES

14 STEVEN BISS

15 Attorney for Plaintiff

16 PAUL LAW GROUP LLP

Attorneys for Defendants

17 BY: EVEREST SCHMIDT

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(The Court and all parties appearing telephonically)

THE COURT: Good afternoon. This is Judge Engelmayer calling the case of, I guess it used to be called Kesner v. Barron's, Inc. It ought be recaptioned Kesner v. Buhl, and I will take care that. But in any event, it is 20 Civ. 3454.

Who do have I for the plaintiff, Harvey Kesner?

MR. BISS: Good afternoon, your Honor.

This is Steve Biss here.

THE COURT: Good afternoon, Mr. Biss.

Who do I have for the defendant, Teri Buhl?

MR. SCHMIDT: Good afternoon, your Honor.

This is Everest Schmidt, and with your permission, I would like to appear pro hac vice.

THE COURT: Yes, you have my permission. I understand that you first applied, I think, for pro hac status very recently, and that your pro hac application was bounced by the clerk's office.

Do I have that right, Mr. Schmidt?

MR. SCHMIDT: That's correct, your Honor. I got notice this morning.

THE COURT: Can you take care of that in the next couple of days?

MR. SCHMIDT: I will try my best, your Honor. I will.

THE COURT: Let's try to succeed. I'm happy to have you in the case and happy to have you pro hac for this

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1 conference, but we need to adhere to the formalities. If you  
2 could attend to that promptly, I would appreciate it.

3 MR. SCHMIDT: I will.

4 THE COURT: All right. Let me confirm that our court  
5 reporter is on the line.

6 THE REPORTER: Good afternoon, your Honor.

7 Lisa Franko of the court reporter's office.

8 THE COURT: Good afternoon, Ms. Franko. As always,  
9 thank you for your service.

10 All right. This is a premotion conference in  
11 anticipation of a motion by the defense for summary judgment.

12 Typically, counsel for Ms. Buhl anticipates moving for  
13 summary judgment directed at one claim that remains by the  
14 plaintiff, which is for defamation. Separately, we will get to  
15 this in a little bit, I'm mindful there was a counterclaim  
16 filed by the defendant under New York's anti-SLAPP, S-L-A-P-P,  
17 statute, as recently amended, and basically that statute got  
18 amended earlier this calendar year. And, thereafter, taking  
19 advantage of the broadened reach of the anti-SLAPP statute,  
20 defense counsel has moved to dismiss the plaintiff's defamation  
21 action, and that motion to dismiss is fully briefed before me.

22 So at the outset, I want to focus just on the  
23 defamation claim, and later on I will have some questions for  
24 counsel about the interplay, if any, between the defamation  
25 claim and the anti-SLAPP counterclaim. But for the time being,

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1 just to keep for orderly discussion, I want to focus on the  
2 defamation claim.

3 Mr. Schmidt, how long have you represented Ms. Buhl?

4 MR. SCHMIDT: Just a few months, your Honor.

5 THE COURT: Look, your outfit began representing her  
6 after the motion to dismiss was resolved. Do I have that  
7 right?

8 MR. SCHMIDT: Your Honor, we filed the motion to  
9 dismiss last year --

10 THE COURT: Right.

11 MR. SCHMIDT: -- during the summer, and we have been  
12 representing her since then.

13 THE COURT: Right. You've been in the case throughout  
14 the entire period of discovery, correct?

15 MR. SCHMIDT: That's correct, your Honor. I'm fully  
16 aware personally of the facts and circumstances applicable  
17 here.

18 THE COURT: Great. Tell me specifically -- obviously,  
19 the fact discovery period is over. I just want to get a sense,  
20 it is informative for me in thinking about summary judgment  
21 litigation, focus on the discovery that you sought either from  
22 the plaintiff or from other parties.

23 What was that?

24 MR. SCHMIDT: Well, we issued two subpoenas. One was  
25 to the SEC, but they objected to that because there is an

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1 ongoing investigation. We also sent a subpoena to MabVax's  
2 counsel, and MabVax, they did disclose quite a bit of  
3 information. Not all of it was relevant. Then, of course, we  
4 did issue interrogatories and requests for production from the  
5 plaintiff.

6 THE COURT: To what degree did you get responses from  
7 the plaintiff to the interrogatories and requests for  
8 production?

9 MR. SCHMIDT: Well, we received a number of  
10 objections, your Honor, and we still have a set of  
11 interrogatories that have not been answered, but I believe most  
12 of these probably relate to our counterclaim.

13 THE COURT: Be that as it may, as it relates to the  
14 schedule that I set, which was key to the defamation claim, it  
15 goes without say that the period for fact discovery passed a  
16 month ago without any notice to me of any discovery disputes.

17 So is there a reason you didn't, if you had a problem  
18 with an objection that Mr. Biss made on behalf of Mr. Kesner,  
19 you knew you were to come to me to seek to enforce your  
20 objection, enforce your demand for production, correct?

21 MR. SCHMIDT: Yes, your Honor. We are aware of that.  
22 But I think in this case, it is really the plaintiff's element  
23 to prove, especially on this summary judgment motion.

24 THE COURT: And that may be, but right now I'm just  
25 trying to understand what the affirmative discovery is that you

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1 elicited. So when I asked you about the interrogatories and  
2 requests for production, you immediately said that you got some  
3 objections.

4 Let's focus on the interrogatories. Were there some  
5 interrogatories that were answered?

6 MR. SCHMIDT: Yes, your Honor.

7 THE COURT: And was there some written discovery that  
8 was produced?

9 MR. SCHMIDT: Yes, your Honor. Yes, there was.

10 THE COURT: How much of each?

11 MR. SCHMIDT: We got about 3,000 pages from the  
12 plaintiff with some discovery production, and I mean some of  
13 that was duplicates and some of that was blank pages. But I  
14 think under the record we have now, I believe we have enough  
15 to move for summary judgment.

16 THE COURT: Other than interrogatories that were  
17 responded to and document requests that were met by either  
18 MabVax or the plaintiff, did you take any other affirmative  
19 discovery in this case?

20 MR. SCHMIDT: No, your Honor.

21 THE COURT: Just to put a fine point on it, did you  
22 ever notice the deposition of Mr. Kesner?

23 MR. SCHMIDT: No, we did not, your Honor.

24 THE COURT: One of the things that I had assumed, but  
25 perhaps wrongly coming out of the motion to dismiss in which I

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1 sustained only a limited subset of the defamation claims, but  
2 they were the ones that accused Mr. Kesner of committing a  
3 crime. I assumed that pretty much the first thing you were  
4 going to do was to take advantage of the opportunity presented  
5 by that to depose Mr. Kesner about whether the statement that  
6 he had committed the crime was true. That would usually be one  
7 of the most obvious tools in a defendant's toolbox in defending  
8 against an allegation of defamation.

9 Not that anything turns on it, but I am curious what  
10 the reason was not to depose Mr. Kesner. Had you proven, for  
11 example, his having committed those crimes that would have  
12 presumably given you a defense here. So I'm curious, why you  
13 didn't do that?

14 MR. SCHMIDT: I believe defense counsel didn't think  
15 it was worth the time simply because we have such a strong  
16 argument on the fault element and really whether Kesner  
17 committed a crime or not. I think that really goes to the  
18 falsity --

19 THE COURT: Right.

20 MR. SCHMIDT: -- as opposed to the fault element. And  
21 really, here, I think it is what did Ms. Buhl know at the time  
22 of publishing. Did she believe what she was publishing was  
23 true? And we hold that she did, and there is no evidence on  
24 this record to suggest otherwise.

25 THE COURT: Look, I appreciate your confidence in your

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1 view here, at least as to the basis for on which you propose to  
2 move for summary judgment. Nonetheless, I am mindful that, if  
3 contrary to your expectations, you were to fail in the motion  
4 for summary judgment, you have unilaterally disarmed on your  
5 ability to prevail on a different element, which is falsity,  
6 have you not?

7 MR. SCHMIDT: Perhaps, your Honor, but I believe  
8 that -- perhaps, your Honor, but I think, also, the plaintiff  
9 never noticed a deposition for the defendant either, and it is  
10 really his burden.

11 THE COURT: Well, no, no, no, no. I noted that, and  
12 I'll have questions when the time comes with Mr. Biss about  
13 that strategic judgment. These are different elements that  
14 are, to some degree, the focus here. It may be the case that  
15 Ms. Buhl is not in a position to affirmative prove-up as a  
16 factual matter that Mr. Kesner is a criminal even if he is.

17 So the plaintiff's decision not to depose Ms. Buhl  
18 doesn't mean that they are surrendering on the element of  
19 falsity. It just means that, for whatever reason, they chose  
20 not to depose Ms. Buhl.

21 Look, I'm just puzzled because, as I understand it,  
22 your client is -- you're representing Ms. Buhl pro bono, are  
23 you not?

24 MR. SCHMIDT: We are, your Honor.

25 THE COURT: Wouldn't any junior associate who works



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1 with you kill to take that deposition pro bono?

2 I mean, talk about great litigation experience. And  
3 it might give you a shot at knocking out the case in another  
4 ground, if you develop evidence of the truth of the statement  
5 that the man is a criminal.

6 MR. SCHMIDT: Speaking personally, yes, your Honor,  
7 but the decision was not up to me.

8 THE COURT: I'm sorry. I thought you were --

9 MR. SCHMIDT: Senior counsel --

10 THE COURT: One moment, I'm speaking. One person at a  
11 time, and that's me.

12 You are the one who has appeared here, albeit orally  
13 pro hac. Under my individual rules, lead counsel is supposed  
14 to be here unless there is leave for somebody else to speak.  
15 If not you, who made the decision to not depose the plaintiff?

16 MR. SCHMIDT: Well, that would be co-counsel, Wesley  
17 Paul, your Honor. And the purpose of my pro hac motion was to  
18 avoid any further delay of this conference. I cannot give you  
19 a clear answer right now why we did not.

20 THE COURT: Is your co-counsel on the phone?

21 MR. SCHMIDT: He's not, your Honor. After the court  
22 rescheduled this conference, he had a conflict at this exact  
23 time in another matter.

24 THE COURT: In the future, you need to abide by my  
25 individual rules. I expect lead counsel to be present so that

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1 important questions like this, like what the strategic  
2 thinking, if any, was behind the decision not to depose your  
3 accuser in the case, it is an obvious question I would have put  
4 to lead counsel, and I regret that there is not somebody on the  
5 phone from the defense who is able to give me that answer.

6 All right. Let me turn to Mr. Biss. And for the time  
7 being, again, I'm just focused on mirror-image questions put to  
8 you.

9 What affirmative discovery did you take of the  
10 defendant, Ms. Buhl?

11 MR. BISS: Judge, we issued some initial  
12 interrogatories and fairly detailed request for production of  
13 documents. They were designed to address what we considered to  
14 be the issues in the case. Principally, my goal was to gather  
15 documentary evidence, since the articles themselves represented  
16 that Ms. Buhl had engaged in due diligence. She read the  
17 record in the SEC case and the MabVax case. I wanted to see  
18 exactly what research she had done, I wanted to see what  
19 communications she had had with other third parties, and she  
20 ended up producing a lot of documentation. She ended up  
21 producing a fair amount; a number of pleadings, a number of  
22 pieces of e-mail correspondence; and other things. And she  
23 objected to some things, but for the most part, I believe we  
24 got what we needed, and I think that's principally why we  
25 didn't depose her.

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1 THE COURT: Tell me what the volume was of what she  
2 produced to you.

3 MR. BISS: Judge, I think I indicated to the court --  
4 I was in depositions, I don't have any file -- it was a fair  
5 amount of documents. She also supplemented. I can't tell you  
6 how many thousands it was. We produced a little over 3,000  
7 pages, and I didn't know that there were some blanks in there,  
8 but we Bates stamped everything.

9 Her production wasn't as large as ours, but it was  
10 pretty big. I mean, it was a fairly voluminous production. It  
11 was more than I thought we were going to get from her. So  
12 there is a fair number of documents in here that would, again,  
13 go to her knowledge, among other things.

14 THE COURT: Did you seek discovery from any third  
15 party?

16 MR. BISS: No, I didn't, Judge. I have a massive file  
17 on the MabVax issues, the SEC issues. You know, obviously my  
18 client has access to the documents that he believes demonstrate  
19 falsity.

20 THE COURT: May I ask you what the thinking was in not  
21 deposing Ms. Buhl?

22 I appreciate that you felt that you got some useful  
23 documents from her, but presumably you would want to pin down  
24 her as to what her thought process was and what she didn't  
25 know. And the documents that you have received may assist you,

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1 but there is nothing like a deposition to exhaust the witness  
2 on propositions like that.

3 What was the thinking in not deposing Ms. Buhl?

4 MR. BISS: Judge, the thinking was utility only. The  
5 thinking was we have enough documents to demonstrate that she  
6 acted with malice, we have enough documents to demonstrate  
7 falsity. There was no utility from doing this. I mean, I've  
8 taken over 10,000 of these things, and sometimes I depose the  
9 party, sometimes I don't depose the party. This one we just  
10 made a decision that there weren't be any useful purpose, other  
11 than to educate Ms. Buhl, no useful purpose in taking her  
12 deposition.

13 THE COURT: OK. You also agree that whatever the fate  
14 was or could have been of the objected-to demands, at this  
15 point, fact discovery is closed?

16 MR. BISS: I agree with that. I mean, if I had  
17 thought that there was an objection worth bringing to your  
18 attention, I would have. But yeah, I agree with what you said  
19 on that.

20 THE COURT: OK. Fair enough.

21 All right. Continuing on just focusing, for the time  
22 being, on the defamation claim by the plaintiff and not at this  
23 point on the anti-SLAPP claim, both sides seem to agree in your  
24 letters, as appears to be the case, that actual malice is the  
25 governing standard.

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1           Let me just get a yes or no to make sure that that is  
2 common ground.

3           Mr. Schmidt?

4           MR. SCHMIDT: Yes, your Honor.

5           THE COURT: Mr. Biss?

6           MR. BISS: Judge, I have some reticence. I just want  
7 to explain that briefly to your Honor. I understand what the  
8 statute says. The revised statute pretty much makes actual  
9 malice the standard even in a private individual case. Our  
10 contention is Mr. Kesner is a private individual. So, again, I  
11 have some reticence as to whether or not actual malice is the  
12 appropriate constitutional standard under Gertz or other  
13 decisions.

14           But, again, I do acknowledge that the statute, as it  
15 has now been amended, it seems to make actual malice applicable  
16 even to a private individual case.

17           THE COURT: I mean, that is really where I'm going  
18 here, which is I appreciate from your perspective that, as a  
19 matter of federal constitutional law, in the absence of a state  
20 statute, you would have a leg to stand on, at least that is the  
21 argument you're making.

22           But given that we're in New York, isn't it right that  
23 as a matter of New York law, where we have a matter of public  
24 concern which I think all agree we have here, actual malice is  
25 the dispositive standard?

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1 MR. BISS: I think that's right, Judge. I said I have  
2 some reticence. I don't want to belabor the issue. I think  
3 that's --

4 THE COURT: What I'm trying to do is understand and  
5 frame the issue for summary judgment. I want to see if we can  
6 close the door by agreement on some other standard being  
7 dispositive here on the fault element of the cause of action.

8 Mr. Biss?

9 MR. BISS: Judge, I do, with regret, I suppose, I do  
10 have to admit the actual malice is probably the standard. I  
11 indicated in, I think, my letter to you that I had some  
12 question about it. But I think, in the end, the statute does  
13 apply. I didn't make any full-hearted or full-throttled  
14 argument that this wasn't a matter of public concern, but I do  
15 think the proper standard is actual malice.

16 THE COURT: All right. Thank you.

17 Look, I appreciate the candor with the court. That is  
18 certainly my read on the situation here, granted without the  
19 benefit of briefing. I thought it would be useful to make sure  
20 we have common ground.

21 All right. Given that, Mr. Schmidt, your summary  
22 judgment argument is presumably then, at least as advertised to  
23 me, key to and limited to that element, am I right, the actual  
24 malice element?

25 MR. SCHMIDT: That's correct, your Honor.

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1 THE COURT: You don't intend to move for summary  
2 judgment on some other element?

3 MR. SCHMIDT: We don't intend to do that, your Honor.

4 THE COURT: Then just give me the short -- this is not  
5 oral argument, it is an opportunity to give me the *Reader's*  
6 *Digest* version, if you will.

7 What's the basis for arguing that Mr. Kesner cannot  
8 get to a jury on actual malice, what he is saying -- and there  
9 may well be more based on the evidence that he said he has  
10 received from Ms. Buhl -- but you would be the movant here.

11 What is the snapshot as to why actual malice can't be  
12 inferred from accusing a person of a crime that he says he  
13 didn't commit?

14 MR. SCHMIDT: Well, just starting off, the court can  
15 cite actual malice on summary judgment and the summary judgment  
16 should be granted if no reasonable fact-finder could find by  
17 clear and convincing evidence that the defendant acted with  
18 actual malice.

19 Now, the court is going to look at, even though it is  
20 a subjective standard, the court is going to look at objective  
21 facts, circumstantial evidence, looking at the motive and the  
22 intent from the defendant. And although the plaintiff claims  
23 that Ms. Buhl simply brought these articles out of her  
24 imagination, I mean, I think really the issue is that falsity  
25 alone is not enough to prove actual malice. And that comes

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1 from the Bose Corp. v. Consumers Union of America case.

2 Further, your Honor, Ms. Buhl was not in a position to  
3 have direct or personal knowledge of some of these facts.  
4 Really, she as a journalist, was looking from the outside, and  
5 looking at various filings with the SEC, AKs, 10Ks that have  
6 the plaintiff's name on them.

7 And furthermore, she has sources, confidential and  
8 non-confidential and also filings in the courts. There is two  
9 MabVax cases in California currently still going on. There is  
10 also, of course, the SEC case, which really supported many of  
11 her findings in her reporting.

12 So really, I think when you're looking at the record,  
13 even though the plaintiff may claim that a statement is false,  
14 I mean, that is not enough to really prove actual malice. It  
15 is whether the defendant subjectively held the thought that the  
16 statement was false.

17 THE COURT: Can we expect then, in support of your  
18 summary judgment motion, since the defense didn't depose  
19 Ms. Buhl, can we expect a declaration from Ms. Buhl attesting  
20 to evidence bearing on her basis for making the accusation?

21 MR. SCHMIDT: That's correct, your Honor. We do  
22 intend to include a declaration by Ms. Buhl.

23 THE COURT: All right. May I ask you, I mean, I  
24 appreciate that, in the ordinary course, one needs to keep the  
25 falsity and fault inquiries distinct. Nevertheless, ultimately



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1 the relationship between the two is case dependent, right. And  
2 there are going to be some accusations you can make where  
3 actual malice is more reasonably inferred from simply the fact  
4 of accusing somebody of something.

5 If I were to imagine whatever the most vile accusation  
6 I could make against John Doe would be -- and we're assuming  
7 I'm naming John Doe by name, and in an article I accuse John  
8 Doe of just the most vile behavior towards, you know, babies  
9 and orphans -- one could presumably infer just from the false  
10 statement about that, that I did so with actual malice.

11 Putting aside whether that is that case, would you  
12 agree that, at least in some circumstances, there is a *res ipsa*  
13 quality about the state of mind you have when you make a  
14 particularly vile allegation?

15 MR. SCHMIDT: I think the falsity was, of course, your  
16 Honor, falsity is a fact in play, but it is not the only  
17 factor. Of course, it is what the plaintiff believed at the  
18 time, and I think the record is clear from the sources that  
19 Ms. Buhl drew upon for her reporting that, you know, this  
20 wasn't from her imagination. She did have some basis for  
21 believing this.

22 THE COURT: So will your summary judgment motion then  
23 be focused on the absence of evidence known to you in the  
24 record of bearing on Ms. Buhl's malicious state of mind?

25 MR. SCHMIDT: Could you rephrase that, your Honor?

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1 THE COURT: Yes.

2 I'm trying to understand whether the look and feel of  
3 your summary judgment is, A, going to just simply focus on the  
4 gap here, what you can contend to be a lack of affirmative  
5 evidence beyond just the falsity of the claim that Ms. Buhl had  
6 malice, or will you be essentially trying to disprove it by  
7 putting before me factual evidence in, let's say, a Buhl  
8 declaration that would tend to be inconsistent with actual  
9 malice?

10 MR. SCHMIDT: Well, I think we are going to attack the  
11 actual malice head on, and really, this is the plaintiff's  
12 element to prove. Really, the record, as I read, is completely  
13 bare of any kind of these objective facts in this  
14 circumstantial evidence that the court could look at to  
15 establish actual malice. So yes, we are going to be using her  
16 declaration to fill the gaps in a way.

17 THE COURT: All right. OK.

18 Let me then ask you, do you expect, Mr. Schmidt, to  
19 have factual declarations from anybody other than Ms. Buhl  
20 submitted in support of the summary judgment motion?

21 MR. SCHMIDT: We haven't gone into that in depth, but  
22 from right now, I don't believe so, your Honor. It would just  
23 be Ms. Buhl.

24 THE COURT: All right. Thank you.

25 Mr. Biss, over to you. If, essentially, the feel of

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1 the declaration were, we know of no evidence of actual malice,  
2 actual malice cannot be inferred even from the assumed falsity  
3 of the accusation that Mr. Kesner was, you know, a criminal in  
4 cahoots with his client, and they basically say, you know, ball  
5 is in your court, Kesner, show us what the proof is on which a  
6 jury could find actual malice, are you relying solely on the  
7 inferences from the fact that Ms. Buhl made the allegation, or  
8 is there something more you've got?

9 MR. BISS: Judge, I think there is something more.

10 I think your Honor is correct in that there is a *res*  
11 *ipsa* quality. I've never heard anybody point it out and use  
12 that phrase, but I think that is exactly what we have. And  
13 there are cases that I'm aware of in the Southern District of  
14 New York in which people have been accused of crimes and the  
15 courts have found there is a genuine issue of fact because  
16 there was no criminal conviction, there was no charge, there  
17 was nothing in the public record that would even provide a  
18 kernel of truth to the statement. And the court then said  
19 there is a reasonable inference to be drawn from the complete  
20 lack of evidence to support the idea that the person knew it,  
21 knew it to false, and, therefore, it was fabricated or it was a  
22 product of her or his imagination.

23 I think the idea of the profession of good faith, the  
24 idea that if you say you can't prove the lack of actual malice  
25 by simply saying that, oh, I believed in good faith, I believed

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1 these statements in good faith, I think the Supreme Court in  
2 the Sanidad case dealt with that very issue.

3 We will probably have declarations from two or three  
4 other individuals, I believe one of whom I indicated in the  
5 letter response that we filed, to dispute the good faith nature  
6 of Ms. Buhl's allegations.

7 In addition --

8 THE COURT: Who are those individuals?

9 MR. BISS: Judge, there may be some member of,  
10 quote-unquote, Team Honig. Right now we're speaking with one  
11 or more of those individuals who are involved in the SEC  
12 litigation. So there may be one or two others that we do  
13 present, one or two other declarations.

14 THE COURT: Are these people who had dealings with  
15 Ms. Buhl?

16 MR. BISS: Yes, they are individuals who would have  
17 knowledge.

18 THE COURT: Of what she knew and was asking?

19 MR. BISS: That's correct, your Honor. They would  
20 have knowledge of what she knew or should have known.

21 THE COURT: OK. In other words, the theory here is  
22 that you're not merely going to be relying on the fact that she  
23 accused Kesner of a crime, but perhaps you will be adding to  
24 that declarations of other people who had firsthand dealings  
25 with her that, from your perspective, may get you over the line

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1 to get to trial here.

2 MR. BISS: Yes, your Honor.

3 THE COURT: May I ask you, just go back though to the  
4 *res ipsa* issue. I was, I'm sure as you could tell, posing a  
5 hypothetical. I wasn't supposing that the facts in this case  
6 give rise to that. I'm happy to receive arguments from either  
7 side on that point. I was merely making a point which seemed  
8 to me obvious. One can imagine an allegation so  
9 disgraceful and, perhaps, so clearly untrue that the inference  
10 of actual malice could be drawn.

11 In this case, and you I think followed that up by  
12 suggesting that the nature of the allegation in this case, even  
13 if there were no corroborative declarations from people who  
14 have had contact with Ms. Buhl, that the nature of the  
15 allegation Ms. Buhl makes against Kesner in this case could  
16 give rise to such an inference on the basis of some New York  
17 case law.

18 May I ask you, I mean, in this case you've got  
19 criminal charges, right, brought against the plaintiff's client  
20 and you've got the MabVax complaint and the SEC's actions  
21 there. Wouldn't the connections that those draw between  
22 Mr. Kesner and the offender and the offense be enough to get  
23 rid of any basis for claiming on the basis of the allegation  
24 alone that *res ipsa* there is an actual malice?

25 I mean, there is, to put it in, you know, literary

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1 terms, there is a lot of smoke here, and isn't where there is a  
2 degree of smoke like this, the fire accusation may be false,  
3 but is it really actual malice?

4 MR. BISS: Well, I mean, Judge, we obviously feel like  
5 the acts of the client in this case can't be imputed to a  
6 lawyer who wasn't involved. I just think that the allegations  
7 here of the criminal events which are repeated are extremely  
8 egregious. And so are they as egregious as a hypothetical that  
9 your Honor suggested? That is just it. I think that's a  
10 matter of viewpoint.

11 Mr. Kesner is an attorney who had a stellar  
12 reputation, and these allegations, repeated allegations of  
13 criminal conduct, attempted to tie him to Team Honig and  
14 accusing him of multiple allegations in multiple different  
15 securities transactions, we think they are extremely egregious  
16 charges to be leveled against an attorney.

17 So, again, I think that there, although your Honor  
18 said there may be smoke here, sometimes there is smoke but, you  
19 know, it demonstrates that the person who made the statement  
20 should have cleared the smoke out of the room before they  
21 started accusing people of crimes.

22 THE COURT: All right. Well played. I take the  
23 point. I mean, I understand what you're saying.

24 All right. Look, I think this gives me a good  
25 understanding of at least what the basis will be for the back

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1 and forth on actual malice.

2 OK. May I ask you, Mr. Schmidt, you're the movant  
3 here. How detailed is your 56.1 statement likely to be?

4 It doesn't appear to be, since we've got one element  
5 and essentially one relatively similar set of repeated  
6 actionable allegations here, it doesn't seem like it is going  
7 to be that dense and deep.

8 But I would welcome some more concrete sense of what  
9 the factual support, the 56.1 statement and attachments, is  
10 going to look like.

11 MR. SCHMIDT: Yes, your Honor.

12 Well, we will be citing to the record and publicly  
13 filed documents. I don't think it is going to be as extensive  
14 as it would be if we were challenging all five elements. We  
15 are really narrowing it to one element. But, nonetheless, and  
16 in contravention of the plaintiff's position, I mean, he is  
17 involved with these three clients and a lot of his actions are  
18 detailed in the SEC complaint. So we are going to be diving  
19 into those filings and the MabVax filings from California and,  
20 of course, what Ms. Buhl believed at the time.

21 THE COURT: So what you're telling me is that some  
22 portion of the 56.1 statement will consist of the pleadings in  
23 the MabVax and SEC actions insofar as those are informative of  
24 Ms. Buhl's state of mind.

25 What other material of consequence at this point do

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1 you expect to populate your 56.1 statement?

2 MR. SCHMIDT: Well, there is other statements on the  
3 record from various people, including letters and e-mails that  
4 concern the plaintiff, and also, your Honor, Ms. Buhl is not  
5 the only one who is really casting the plaintiff in this light.  
6 There is numerous, numerous public filings, and although we  
7 can't take the truth of them for what it is, they are still out  
8 there. They are still allegations of misconduct, and serious  
9 misconduct.

10 THE COURT: May I ask you, though, I parsed Ms. Buhl's  
11 many blogs carefully and drew out as actionable only the  
12 subsets of them that accuse Kesner of a crime.

13 Is what you're saying that other publications not  
14 merely are disparaging towards Mr. Kesner because that wouldn't  
15 be actionable in all likelihood?

16 I certainly found the rest of what Ms. Buhl wrote not  
17 to be actionable. I found the entirety of the article that  
18 Kesner seized upon in Barron's to be not actionable.

19 Are you saying that there actually are other materials  
20 out there written before or at the time that Ms. Buhl wrote  
21 hers that -- watch my words here -- accused Mr. Kesner of a  
22 crime?

23 MR. SCHMIDT: No, your Honor. Ms. Buhl has never  
24 really accused the plaintiff of a crime. She has said numerous  
25 times that he has never been charged and that he is not a named



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1 defendant.

2 THE COURT: No, no, no. She's the accuser. She's the  
3 accuser. Look at page 41, among many other excerpts of my  
4 decision, in which I write, "Although the twig links Buhl's  
5 March 26 article, it also flatly accuses Kesner of breaking the  
6 law." I have construed repeated statements by your client that  
7 way. So my question to you is, is she the only one who in  
8 print has done that?

9 MR. SCHMIDT: I think there are inferences from these  
10 public court filings that, if proven true, could amount to a  
11 crime of securities law.

12 THE COURT: But the answer then to my question is no,  
13 because you've just changed the hypothetical. You said  
14 inferences if proven true. The issue is not whether the facts  
15 that other people wrote or that Ms. Buhl elsewhere wrote about  
16 Mr. Kesner are consistent with his committing a crime. Of  
17 course they are. The issue is whether that means he did commit  
18 a crime.

19 Any lawyer, it's possible, aided and abetted the  
20 client. It's possible that is true. It's another thing to  
21 flat out say it. I thought you just said to me that part of  
22 what your 56.1 statement would be, would be showing bird's of a  
23 feather. People like Ms. Buhl who, with similar data available  
24 to them, equally accused Mr. Kesner of a crime. Under my  
25 questioning, you seem to be backing away from that.

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Which is it?

MR. SCHMIDT: We are in possession of a letter that I would say accuses Mr. Kesner of a crime, yes.

THE COURT: Where was the letter published?

MR. SCHMIDT: It was not published. It was, I think, sent to a board member of one of these publicly -- public companies, and also it seems to have been sent to the DOJ and the SEC.

THE COURT: But not something that is subject to the standards of defamation, given its non-publication?

MR. SCHMIDT: I believe it could be considered a publication because it was sent to more than one person and it was also posted online.

THE COURT: OK. All right. Look, I assume your 56.1, notwithstanding the limited discovery taken, will be up to the task of authenticating as court admissible, everything you're attaching. One of the challenges we get in a case -- and I see this time and again, and this applies to both counsel here -- when you don't take depositions, you run the risk that the items you're trying to put before the court are unauthenticated and you will be opening yourself up to a rejoinder by the other side that the evidence that you are citing is not ready for prime time in court. It's not been properly authenticated. I expect you'll be able to do so.

All right. With respect to you, Mr. Biss, what's the

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1 volume of evidentiary material you expect to be bringing to  
2 bear on the summary judgment motion, in effect, to beef up the  
3 record to make sure from your perspective, you have cleared the  
4 bar in terms of an amount of evidence that could support a jury  
5 verdict that Ms. Buhl acted with actual malice?

6 MR. BISS: Candidly, Judge, I don't want to sound  
7 wishy-washy. I'm going to indicate I'm not exactly sure what  
8 the volume of it is going to be. We plan to have declarations,  
9 we plan to have documents, we plan to have the articles in  
10 question, the blogs in question.

11 So I don't know the exact volume of material. We  
12 intend to present a fairly lengthy, I don't want to say  
13 dissertation, because I just said it's not going to be lengthy,  
14 but we intend to provide the court with an exhaustive 56.1  
15 statement on the actual malice issues.

16 THE COURT: OK. All right. Well, look, counsel, I  
17 think the next step for me is to set a schedule for briefing as  
18 to this motion. Then after that, I want to just probe a little  
19 bit the relationship between the defamation and the anti-SLAPP  
20 claim and counterclaim respectively.

21 For the time being the issue is a schedule. There are  
22 cases in which I ask counsel to come together before the  
23 briefing begins to submit a set of joint stipulated facts.  
24 This is not a case in which I think this would be useful. You  
25 have had no time to collaborate on discovery. You got some

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1 documents going back and forth. No depositions. And it seems to me  
2 I'll be inviting more secondary disputes, if I ask you to work  
3 together.

4 I would rather set a very brief schedule, first  
5 of all, for the defendant's submissions, and then for the  
6 plaintiff's opposition, and then for the defendant's reply, and  
7 get it on here.

8 Mr. Schmidt, how soon until you can file your opening  
9 motion for summary judgment and obviously your supportive 56.1  
10 materials?

11 MR. SCHMIDT: We would like at least two weeks, your  
12 Honor, but more time would be useful.

13 THE COURT: Look, I'm certainly willing to give each  
14 side three weeks. I think that is reasonable. It's the summer  
15 and I appreciate that there is probably some way in which the  
16 pandemic has impeded your practice.

17 Will three weeks be tough?

18 MR. SCHMIDT: Yes, your Honor.

19 THE COURT: Three weeks from July the 19th is  
20 August 9.

21 Mr. Biss, three weeks for you to respond?

22 MR. BISS: Judge, that's fine.

23 THE COURT: August 30.

24 Then, Mr. Schmidt, I'm going to give you two weeks to  
25 reply. I'm mindful that picks up Labor Day. I usually would

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1 have given one and a half. Two weeks seems to make sense.

2 That is September 12.

3 Does that work for you, Mr. Schmidt?

4 MR. SCHMIDT: Yes, your Honor. Thank you.

5 THE COURT: I will issue a scheduling order that  
6 simply sets out those dates without more as the schedule for  
7 the summary judgment submissions.

8 I do want to urge everybody, you should read some of  
9 my old summary judgment decisions. Among other things, there  
10 is usually a framing paragraph or footnote early on, you know,  
11 reiterating standard, right down the middle, circuit law  
12 vis-a-vis materials that are cognizable and materials that need  
13 to get set aside for lack of conformity with required procedure  
14 with respect to 56.1 statements, and I cannot tell you how  
15 often it is that people trip up on that.

16 For example, you know, there is a well-founded factual  
17 proposition in the 56.1 statement of a movant, and it is just  
18 generally denied by the opponent, but without, unlike the  
19 affirmative statement, any admissible evidence in support of  
20 the opposition. Under those circumstances, I have got to  
21 credit the factually supported statement in the 56.1.

22 I, as well, oftentimes see situations in which there  
23 is a 56.1 proposition put forward by a party which may well be  
24 something that could have been proven by competent evidence.  
25 Alas, the material in support of it is unauthenticated, just

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1 like a newspaper story or if it is a writing that is secondhand  
2 or unauthenticated.

3 Don't be that guy. I want you to make sure that you  
4 are ticking and tying each statement to admissible evidence.  
5 Just saying because I want this case to be litigated on the  
6 merits, not because there was lawyerly inattention to those  
7 evidentiary foundations.

8 All right. Before we pivot to the anti-SLAPP  
9 material, I'm just going to go around the horn to see if there  
10 is anything else I need to be mindful of as we embark on the  
11 important part of this case, that is briefing summary judgment.

12 Mr. Schmidt, you go first as the movant. Is there  
13 anything else that need to be said about this premotion  
14 conference?

15 MR. SCHMIDT: Thank you, your Honor. I don't believe  
16 so. I don't believe so.

17 THE COURT: Mr. Biss?

18 MR. BISS: No, sir.

19 THE COURT: All right. Look, I thank you for the back  
20 and forth. It is an interesting case and an important one, and  
21 I'm eager to see what you each bring to bear.

22 Look, what I would say is just as guidance. I am  
23 interested in the extent to which on the facts here, mileage,  
24 if any, towards the actual malice requirement can be gotten  
25 from the fact of an accusation allegedly false of his

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1 commission of a crime and how much one goes beyond that. I'll  
2 be eager to see what you come up with from the case law.

3 Obviously, a very important issue here is going to be,  
4 to the extent that we don't have much evidence -- and there may  
5 be a lot or there may be zero -- about Ms. Buhl's behavior in  
6 fact and because there have been no depositions taken, and  
7 including of her, there may not be a lot of, you know, tactical  
8 evidence about her movements and questions and diligence or  
9 failure to due diligence.

10 Oftentimes, somebody's failure to ask questions would  
11 be the sort of thing that you might make inferences about. But  
12 the lack of a deposition here may mean that she is a shadowy  
13 figure and there isn't sort of lot of evidence reconstructing  
14 all of her investigative process. So one of the questions I  
15 will be interested in is what inferences can be drawn from the  
16 materials that were known to be available to her, including  
17 MabVax and SEC.

18 All right. The remaining issue I want to take up is  
19 this. I've got a fully briefed anti-SLAPP motion here, motion  
20 to dismiss the counterclaim here. The motion is brought by the  
21 plaintiff. Sort of a double negative with all the anti-SLAPP  
22 stuff. Ultimately, it is a motion by Mr. Biss.

23 Mr. Biss, just briefly, play out the scenarios here.  
24 Suppose for argument sake you lose on summary judgment on  
25 actual malice. I'm going to give you the opposite hypothetical

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1 later. Assuming you lose on summary judgment, that is to say  
2 the case is tossed.

3 What happens then to the anti-SLAPP counterclaim?  
4 Does it have any indication for it?

5 MR. BISS: Judge, I haven't really thought of that  
6 question. I suppose if I lose on the main claim, on the main  
7 defamation claim, then the issue would still remain whether or  
8 not I had a substantial basis --

9 THE COURT: Right.

10 MR. BISS: -- for bringing it. So there is interplay.  
11 I understand your Honor saying there is interplay. I think,  
12 ultimately, the correct analysis would be, even if the  
13 plaintiff loses this case, that does not automatically mean  
14 that the SLAPP fees, or whatever the correct phrase is, are to  
15 be awarded because there are plenty of cases in the Southern  
16 District and in New York in which the plaintiff didn't proceed,  
17 but the court found that certainly just because the  
18 plaintiff -- just because the case was dismissed for whatever  
19 reason, that doesn't mean that the plaintiff didn't have a  
20 substantial basis for bringing it in the first place.

21 THE COURT: Understood. Here is the question.

22 The tricky aspect of the chronology here is that you  
23 brought your case before the New York anti-SLAPP statute was  
24 amended to give Ms. Buhl a manner of attack. So your pleadings  
25 by definition, your complaint didn't have to be measured



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1 against the New York anti-SLAPP statute at the time that it was  
2 filed.

3 I guess the question would be, let's suppose you lose  
4 on summary judgment, the defamation claim gets tossed. How do  
5 we then proceed?

6 In other words, it may be that, you know, can the  
7 anti-SLAPP claim be resolved on the pleadings, or because the  
8 pleadings preceded the broadening of the statute, which now  
9 gives a defamation defendant more of a basis to attack  
10 pleadings, do we almost have to get to discovery to litigate  
11 the anti-SLAPP claim?

12 MR. BISS: I think we need to get to discovery to  
13 eliminate anti-SLAPP.

14 THE COURT: Now let's suppose that you prevail on  
15 summary judgment and this case is going to trial on defamation,  
16 Mr. Biss. Does that by definition mean that the anti-SLAPP  
17 claim has to be dismissed, or can it still coexist and go  
18 further?

19 MR. BISS: Judge, I almost want to argue to your Honor  
20 that the fact that it has proceeded past 12(b)(6) means that  
21 the SLAPP claim has to go away. I think there is case we cited  
22 in one of the memos that we filed to that extent.

23 But yes, I mean, I think if I prevail, at least at  
24 summary judgment, then the issue is there is a factual issue,  
25 and I would think that that would, per se, mean that there is a

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1 substantial basis in fact for the claim.

2 THE COURT: What, though, if the evidence on which you  
3 prevail substantially is evidence you didn't have on hand at  
4 the time you filed the lawsuit, but came only later?

5 The anti-SLAPP provision is really focused on what you  
6 had at the time you brought the case, right?

7 MR. BISS: That's correct, but I don't know that I  
8 with be foreclosed from utilizing that after that post-filing  
9 evidence to still demonstrate that the case had a substantial  
10 basis in fact. It's kind of like in the substantial truth area  
11 in terms of the article.

12 I mean, I've got cases, Judge, where the defendant  
13 reporter, you know, made the statements that they did in the  
14 article based on one interview. And then when they argue  
15 substantial truths, they do so based on an evidentiary record  
16 that they didn't know existed at the time of the time that they  
17 reported the article.

18 So, again, I mean, I think my point is that after  
19 required evidence should be admissible in my view to oppose the  
20 SLAPP motion even though it wasn't in the original filings.

21 THE COURT: Is your argument to that effect enhanced  
22 by the fact that these anti-SLAPP statutes took effect in the  
23 middle of the discovery period here?

24 In other words, whatever decision you made to bring  
25 the lawsuit, you didn't have to be thinking anti-SLAPP thoughts

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1 at the time you brought it because there wasn't a statute that  
2 applied to this area.

3 MR. BISS: Yes, and certainly I shouldn't be  
4 penalized, in my view, by the fact that the plaintiff in this  
5 case could not possibly have foreseen an amendment to the  
6 statute.

7 THE COURT: All right. Thank you. That is helpful.

8 Mr. Schmidt, let me turn to you, and let's start with  
9 that hypothetical. Let's suppose you lose on summary judgment,  
10 i.e., the defamation case is going to trial.

11 What does that mean for your anti-SLAPP counterclaim?

12 MR. SCHMIDT: I'm not sure, your Honor. I think  
13 briefing on this would be useful. I don't necessarily think it  
14 would automatically end our claim. On another point, I believe  
15 Section 70(a), it actually talks about whether the plaintiff  
16 brought and continued the case, in which the case, the  
17 plaintiff is obviously continued this case even after the  
18 statute was amended.

19 THE COURT: Right. So I guess, Mr. Schmidt, the  
20 question --

21 By the way, I heard a beep on the line. I believe  
22 those are people for my four o'clock. You should stay mum.  
23 I'm finishing a three o'clock conference.

24 Mr. Schmidt, coming back to that, though, I take it  
25 then that you agree that the point of reference with respect to

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1 evaluating compliance with the anti-SLAPP statute is at the  
2 point of continuation by Mr. Biss of the lawsuit, not at the  
3 point of his bringing it, because at the point he brought it,  
4 the anti-SLAPP statute hadn't been amended to cover this fact  
5 pattern?

6 MR. SCHMIDT: I would agree with that, your Honor.

7 I believe the starting period would be the enactment  
8 of the law, I believe on November, sometime this November of  
9 2020.

10 THE COURT: Now, the final scenario for Mr. Schmidt.  
11 Assuming that you were to prevail and secure summary judgment  
12 as against the defamation claim, does that necessarily mean you  
13 win your SLAPP claim, or does it require an investigation in  
14 effect of what the plaintiff knew as of the time the anti-SLAPP  
15 statute was passed and a decision was made or imputed to  
16 continue the defamation claim?

17 MR. SCHMIDT: Because there is really three parts of  
18 Section 70(a) and that is, you know, the attorneys' fees and  
19 that is compensatory damages and then there is punitive  
20 damages. So the last two really go to the intent of the  
21 plaintiff, the SLAPP plaintiff.

22 To your question, your Honor, I think that, I mean, if  
23 we win on this summary judgment, and it is conclusive, I would  
24 say that is very strong evidence that this entire case was  
25 filed without a substantial basis in fact or law. Yes, I think

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1 that would be a controlling fact. It would be very good for  
2 us.

3 THE COURT: I don't doubt that it would be good for  
4 your side. That doesn't make it a controlling fact.

5 Look, very helpful. Look, I'll issue an order that  
6 sets out the summary judgment briefing schedule. I think it is  
7 more likely than not I will entertain oral argument in this  
8 case, both to make sure that I'm as well versed in this as I  
9 can in resolving the summary judgment, but it may also be that  
10 we are all in a better position at that point to explore the  
11 relationship between the claim and the anti-SLAPP counterclaim  
12 in the case.

13 I'm not, however, going to schedule oral argument  
14 until my staff and I have had a chance to review the briefs.  
15 In any event, thank you for very helpful discussion.

16 I wish you both a good summer. Look forward to seeing  
17 what you submit on this, and we will be in touch for scheduling  
18 oral argument.

19 I need about a ten-minute break and then I will jump  
20 on the call. Thanks. We stand adjourned.

21 (Adjourned)  
22  
23  
24  
25